No. 2503

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. B. HAMMOND,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Oral Argument of Charles S. Wheeler.

Filed this.....day of January, 1916.

F. D. MONCKTON, Clerk,

By....., Deputy Clerk.

The James H. Barry Co.
San Francisco

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ORAL ARGUMENT OF CHARLES S. WHEELER.

I.

THE HELL GATE TRESPASSES—SYLLABUS OF THE ARGUMENT.

1. ALLEGED TRESPASSES VERY ANCIENT.—The complaint charges appellant with having trespassed more than a quarter of a century ago upon two widely separated tracts of Government land in Montana—one on the Hell Gate River, the other on the Blackfoot.

2. APPELLANT NOT GUILTY OF CONVERSION.—The appellant at no time had any part in the taking or

handling of any timber from the Hell Gate tract. So far as the Hell Gate trespass is concerned, there is not even an atom of evidence to justify the verdict.

3. TRESPASSES ON THE HELL GATE BY OTHER PERSONS WERE INNOCENT.—Whatever timber was in fact cut on the Hell Gate was innocently taken by one Fred A. Hammond and by one George W. Fenwick. For 32 years their conduct would have been entirely lawful under repeated decisions of this Court. In 1910 an opinion of the United States Supreme Court, which was delivered in a case where no brief was presented for the timber men, overturned the established rule. By reason of said decision, acts which for 32 years had been innocent and lawful were converted into timber thefts. The case at bar is an outgrowth of that remarkable *ex parte* overturning of the long recognized interpretation of the Act of 1878 which in all justice should have been considered *stare decisis.*

4. INJUSTICE OF GOVERNMENT'S ATTITUDE.—In view of the sanction which the courts had so long given to cutting upon "mineral lands" in Montana, it would have been most inequitable if Fenwick and Fred Hammond, the men who owned the Hell Gate mill and who in fact took this timber, were now called upon to pay to the Government even for stumpage value—not to mention profits and interest.

5. VERDICT UTTERLY WRONG IN MORALS AND IN LAW.—But neither Fenwick nor Fred Hammond who took the timber have been sued. Appellant A. B. Hammond did not own the Hell Gate mill; he did not handle its lumber, and had not even a remote connection with a single act of conversion. Nevertheless, the jury not only held him liable for the stumpage value and the assumed profits on all the lumber taken, but they charged him with $19,040.00 interest thereon. The verdict would be ridiculous if it were not so outrageous.

May it please the Court: The writ of error in this case brings before the Court a judgment in favor of the Government, entered upon a verdict for $51,040, for timber trespasses alleged to have occurred in the State of Montana. The most recent of these alleged trespasses occurred *more than twenty years ago!* the earliest *more than thirty years ago!*

It is without hesitation that I say to your Honors that I am here in an effort to right an injustice and a wrong. To that end I will lay stress chiefly upon the proposition that there is in this case not one atom of evidence which justifies this verdict against this defendant,—and I measure my words when I make that assertion. The judgment is bad in law, and it is morally wrong.

So that your Honors may the better comprehend the questions involved, I will ask you to picture two rivers in the State of Montana,—one the Hell Gate, and the other the Blackfoot. Along these two streams are the lands upon which the evidence is to be laid. These respective tracts of land are about twenty-five miles apart, one tract being upon the Hell Gate River, and the other upon the Blackfoot River. The circumstances attending the cutting of timber upon these respective tracts are essentially different, and I am forced to consider them one by one.

THE MILL ON THE HELL GATE WAS BUILT BY MONTANA IMPROVEMENT COMPANY.

First, as to this tract upon the Hell Gate River: There, in the year 1885, a corporation known as the Montana Improvement Company, erected a second-hand saw mill; that is to say, this Montana Improvement Company moved the said saw mill from a place called Thompson Falls—a place not in any way involved in this action,—and set it up in this Hell Gate Canyon. The evidence is that prior to its removal from Thompson Falls it was sold to and was thereafter set up for a man named Fred Hammond, who chances to have been—he is now dead—a brother of the defendant A. B. Hammond (Tr., pp. 223-227).

THE NORTHERN PACIFIC RAILROAD CO. CONTROLLED THE SAID MONTANA IMPROVEMENT COMPANY.

In order that your Honors may understand the circumstances you will have to know something of the history of that Montana Improvement Company.

When the Northern Pacific Railroad was in course of construction, the firm of E. L. Bonner & Co. undertook a contract for clearing 250 miles of its right of way in Montana. That firm of E. L. Bonner & Co. was composed of the defendant A. B. Hammond, and of a Mr. Bonner, a Mr. Eddy, and a Mr. Robertson (Tr., pp. 643-50). The firm was appointed, as was the custom in such cases, the agent of the Northern Pacific Railroad to enter upon the public lands and there cut the ties, piling, and bridge tim-

bers necessary for the construction of the railroad and to furnish it with lumber for stations and buildings (Tr., pp. 644-49). In the course of getting out the timber for the construction of this line of railroad, there was naturally a large amount of surplus lumber—when you saw bridge timbers and extra large lumber, a surplus of small lumber is of course left. E. L. Bonner & Co. in consequence had on hand a lot of such surplus lumber at the close of their contract with the railroad.

In the year 1882, the railroad being about completed, a new and totally different contract was entered into—it appears in the record (Tr., pp. 710-719)—between the Northern Pacific Railroad and a new corporation then organized and called the Montana Improvement Company. Under this new contract the Northern Pacific Railroad was to have 51 per cent. of the stock of the Montana Improvement Company. The rest of the stock was divided up among different persons. These stockholders included, among others, the members of the said firm of E. L. Bonner & Co. which had previously held the said lumber contract.

Under this new contract E. L. Bonner & Co. transferred to the Montana Improvement Company all of the mills which the firm had used in supplying the railroad with construction timbers, and it also transferred to the new corporation this surplus lumber which was on hand (Tr., p. 653), and the said Mon-

tana Improvement Company secured the right under this contract to cut upon all of the Montana lands within the Northern Pacific Railroad grant. These lands covered a very large area. It was a corporation of large capital, and undoubtedly it had expectations of doing a very large business in the way of manufacturing and disposing of lumber. The details of the contract are not necessary save these facts: That the Northern Pacific Railroad was the owner of 51 per cent. of the stock; the defendant, A. B. Hammond, was the owner of only one-fifteenth of the stock, and the rest of the stock was owned in various blocks by different individuals

(Tr., pp. 653-714).

WHY THE SAID MONTANA IMPROVEMENT COMPANY WENT INTO LIQUIDATION IN THE FALL OF 1885.

Now, it appears that it was expected by the people who organized the Montana Improvement Company that not only would it be able to utilize the timber upon the railroad lands within the Northern Pacific land grant, but that it, the corporation, being a citizen of the State of Montana, would have the additional right to enter upon what was then known as "mineral lands" of the United States and there cut for domestic, mining, agricultural and other permitted uses under the United States statutes, the timber upon these mineral lands (Act of June 3d, 1878).

Although organized in 1883, the Montana Improvement Company did not begin any active operations until 1885, and almost as soon as it began operations

the Government of the United States, in the language of one of the witnesses, "got after them" (Tr., pp. 224-5).

Your Honors will take judicial notice, I assume, of the reported cases showing that suit by the United States was instituted against both the Railroad and the Improvement Company; that a demurrer was successfully interposed in behalf of the Montana Improvement Company, and that subsequently the case was decided in favor of the Northern Pacific Railroad Company. An appeal was taken and the appeal was dismissed (*U. S.* v. *N. P. Railroad,* 140 U. S., 703, same case in the trial Court, 6 Mont., 361. The record in the trial Court shows that Montana Improvement Company was originally a party and demurred successfully.)

It would appear that it was the contention of the Government in that litigation, *first,* that as to certain *unsurveyed* lands, which were *non-mineral,* the company could not make use of any of the timber, for the reason—so the Government contended—that said Montana Improvement Company claimed under the Northern Pacific Railroad, and that the said railroad company was a tenant in common with the Government (see 6 Mont., 361)—a theory overturned by the decision in that case.

Further, the proposition seems to have been urged as against the Montana Improvement Company that so far as these so-called "mineral lands" were con-

cerned, the holding of 51 per cent. of the stock of the corporation by the railroad company—in other words, a controlling interest—would bring the case within the prohibitive clause of the timber land act of 1878, which timber land act prohibited any railroad company from having the benefit of the act (Tr., p. 698). That seems to have been why the Government "got after" the Montana Improvement Company. There were no charges in the said suits brought by the Government involving moral turpitude. Whatever may have been the moving cause—and the record indicates that the said suit by the Government was the only reason (Tr., p. 698)—whatever may have been the reasons for so doing—the Northern Pacific Railroad Company and all of the other stockholders in Montana Improvement Company, including the defendant Hammond, concluded in the year 1885—shortly after its active operations began—to go out of the business of manufacturing lumber and to wind up and liquidate the affairs of the company.

THE SALE OF THE HELL GATE MILL BY THE MONTANA IMPROVEMENT COMPANY TO FRED HAMMOND IN 1885 WAS MADE IN GOOD FAITH.

I wish at this point to impress upon your Honors the fact that there is not the slightest question or inference fairly deducible from this record that this liquidation by the Montana Improvement Company was not inaugurated and conducted in absolute good faith, or that it was not just what it purported to be; namely, an absolute withdrawal of said Company from

any saw mill business, and a winding up and liquidation of its affairs.

Among its properties was unsold lumber in various lumber yards which lumber had come to it from this firm of E. L. Bonner & Company. This lumber is not here involved. There were also various mills, and among these mills was one then situate at Thompson Falls. That mill in the fall of 1885 was moved to and set up in the Hell Gate Canyon. Now, I think it is absolutely clear from the testimony of witnesses on behalf of the Government itself,—I do not ask you to turn to the corroboration by defendant's witnesses,—they too made it very clear (Tr., pp. 667, 656-7)—but it is abundantly clear from the Government's own witnesses that when Fred A. Hammond purchased that mill, the so-called Thompson mill, from the Montana Improvement Company, that as a part of that transaction the mill was to be moved and was moved from Thompson Falls and set up by the Montana Improvement Company in this Hell Gate Canyon and was to be and was delivered over to said Fred Hammond by that corporation in completed form in the fall of 1885 (Tr., pp. 223-227).

At that point the Montana Improvement Company is free from any further connection of any kind with the mill or the cutting on the Hell Gate. That company did not handle the cut of that mill. (Tr., p. 242). At no time during the connection of the Montana Improvement Company with that mill did the defendant A. B. Hammond do the remotest thing to make him liable to the Government for one penny.

APPELLANT IN NO MANNER CONNECTED WITH FRED HAMMOND'S OPERATIONS ON THE HELL GATE.

Fred Hammond proceeded to cut timber in the winter of 1885-6 upon what at that time were generally considered to be "mineral lands." While the guilt or innocence of his conduct in thus cutting timber is not a matter of legal concern to us here—for appellant was not a party to the cutting—nevertheless, the fact is that Fred Hammond was acting in good faith. This matter I shall deal with later when discussing the cutting by this mill under George W. Fenwick's ownership. Fred Hammond operated this Hell Gate mill so owned by him, during that winter of '85-86 only. I am not touching upon any question that there is any doubt or dispute about; I am taking the undisputed facts in this record (Tr., pp. 227-538).

Fred Hammond cut very little lumber. His mill was shut down during the winter. He was logging and just getting ready in the spring when Fenwick bought him out (Tr., p. 581).

GEORGE W. FENWICK PURCHASED THE HELL GATE MILL FROM FRED HAMMOND IN 1886.

The evidence is absolutely uncontradicted that in 1886, in the month of May, George W. Fenwick, in good faith, bought this mill that had been erected on the Hell Gate—the same mill erected for Fred Hammond by Montana Improvement Company and which that company had sold to said Fred Hammond

in the course of its said liquidation (Tr., pp. 556-7, 227).

Mr. Fenwick proceeded to cut lumber on the Hell Gate from the spring of 1886 on, and the lands from which he took lumber were during all of that period unsurveyed. They were not surveyed until 1902, and his operations on the Hell Gate ceased early in 1891, and he himself departed in the middle of that year from his Hell Gate property to take another position in another place. While Fenwick was cutting upon the Hell Gate, we know what became not only of every stick of timber cut by him, but also of all that was in the yards when he purchased the said mill. All of the lumber that he bought from F. A. Hammond he sold to Marcus Daly for use in the Anaconda mines. All that Fenwick himself cut, he also sold to Daly (Tr., pp. 243, 544-5). It was all used within the State of Montana. Fenwick was a citizen. If these Hell Gate lands from which Fenwick was cutting were "mineral lands," he had a right to cut that timber for the uses to which it was put, under the Act of June 3, 1878.

AS CONSTRUED MANY TIMES BY THIS COURT, FENWICK'S CUTTING ON THE HELL GATE WAS LAWFUL UNDER THE ACT OF '78.

Your Honors have had before you many times the Act of June 3, 1878. This land in the Hell Gate was of the quality that for 32 years prior to 1910 had been supposed to be "mineral land," within the meaning of

that Act of 1878. If it was, he, Fenwick, as I have said, had a right to cut timber from it for the purposes for which it was actually used. The land answered every description that the Secretary of the Interior, Secretary Teller, had laid down in his letter of June 3d, 1882.

> "Where the lands are situated in districts of country that are mountainous, interspersed with gulches and narrow valleys, and minerals are known to exist at different points therein, such lands, in the absence of proof to the contrary, will be held to be mineral in character; but where there are extensive valleys, plains or mountain ranges, and no known minerals exist, the land may be considered and treated as non-mineral."

Dec. of Dept. of Interior, Vol. I, p. 698.

The lands which Fenwick cut over answered the description which your Honors in three several decisions in this very Court of Appeals held that residents of Montana could lawfully cut over, for the reason that they were included in the term "mineral land" as used in the Act of June 3, 1878.

United States v. *Basic Co.,* 121 Fed., 504;
United States v. *Rossi,* 133 Fed., 380;
United States v. *Plowman,* 151 Fed., 1022.

And it answered the description similarly applied to "mineral lands" by the United States Circuit Courts at least as early as 1889.

United States v. *Edwards,* 38 Fed., 812;
United States v. *Richmond Mining Co.,* 40 Fed., 415.

Here, then, was the situation which confronted said George W. Fenwick between 1886 and 1891: The timber upon this land might under the statute be lawfully cut by him, provided the lumber was used for just such purposes as this lumber is shown to have been actually used for (Tr., p. 572). His counsel so advised him (Tr., p. 559). The courts took the same view. If George W. Fenwick were the defendant, and had his case come before your Honors, at any time prior to the 21st day of February, 1910, I would immediately have pointed your Honors to your own decisions, and the clear evidence appearing in this record as to the "mineral" character of this land, as the term was then understood (Tr., pp. 557-559). I would have called your Honors' attention to the fact that you had held repeatedly that land need not be susceptible of being taken up as a mining claim before it could be considered "mineral land" and the timber taken from it, under the statute of June 3, 1878. I would have pointed out the general character of this Hell Gate land as mineral land, as defined by the Secretary of the Interior Teller in his letter of June 30, 1882 (Vol. I, Pub. Land Dec., 697), and as defined by the various trial courts where the question has arisen in the Federal jurisdiction. I would have asked your Honors upon that showing in connection with the rest of the evidence as to mineral character of the country and the actual use made of the lumber,

to hold that this man Fenwick, a citizen, had a perfect right to take every stick of timber that he took.

And if it had been objected that Fenwick did not comply with all of the regulations of the Secretary of the Interior, as to requiring affidavits from the purchasers, and the like, I would have said that every lawful regulation made by the Secretary was complied with by Fenwick; that the language of the statute is that the timber must be *"cut"* under regulations prescribed by the Secretary of the Interior—that every regulation as to the size of the timber and method of cutting had been complied with by Fenwick, and that his only shortcoming, if any, appears to have been that he did not keep certain books which the rules said a timber cutter should keep, and that he did not exact from the vendees of the lumber, affidavits that they would not use the lumber outside of Montana. I would have called your Honors' attention to the fact that so far as the actual cutting and removing of the timber from the land was concerned, all of the governmental regulations were complied with by Fenwick; that hence the cutting was not a conversion when it took place; and that a failure to keep the rules relating to subsequent acts could not transform an innocent and perfectly lawful act into a tortious taking. I would have said that if upon any theory Fenwick could have been held liable for a failure to comply with the regulations as to what he should do with the lumber after he had cut and taken the trees

away from the Government land, such liability must rest upon a different cause of action than conversion—assumpsit, for instance, but not conversion.

THE RULINGS OF THIS COURT WERE UPSET IN 1910 BY THE UNITED STATES SUPREME COURT.

All of these defenses I could have urged successfully in Fenwick's behalf if he had been sued by the Government at any time within the twenty-four years prior to February, 1910. But this defense would have availed nothing for him after that date, because on the 21st day of February, 1910, the Supreme Court of the United States rendered a sweeping decision in the case of *U. S.* v. *Plowman,* 216 U. S., p. 372, in which every one of the numerous decisions of this Court and of the Court of Appeals for the Eighth Circuit and of every Federal Court which had theretofore construed the Act of 1878 were completely swept aside.

By that decision, men situated as was Fenwick and who had acted in good faith and in accordance with the rulings of this Court and of other distinguished courts—decisions which had stood unchanged for a period of over 30 years—became, in the parlance of the day, mere "timber thieves."

The pity of it is that in that case—which gives birth to such injustice—there was not even an appearance nor a brief for the man who cut the timber. Counsel for the Government had it all his own way (*U. S.* v. *Plowman,* 216 U. S., 372).

Had Mr. Fenwick been sued in this action for the timber he took—if he instead of Mr. Hammond were

the defendant—the claim, in view of this long line of decisions referred to, would have been morally unjustifiable on the part of the Government. The doctrine of *stare decisis* should apply in cases where for 30 years the decisions of the Federal Courts construing a Federal statute and declaring certain acts to be lawful have been uniform.

But be that as it may, I am not here defending Mr. Fenwick. A. B. Hammond is not George W. Fenwick, and the question naturally will arise in your minds:

Upon what possible theory has A. B. Hammond been held guilty of Fenwick's acts?

All of this timber was cut by Fenwick. There is not one jot or tittle in this evidence to suggest that A. B. Hammond had any interest with Fenwick in this mill. There is not one suggestion in the whole evidence from which the fair inference can be drawn that he ever handled a log or touched a stick of this timber; or that he ever gave any directions in regard to it; or that he ever received, directly or indirectly, the profits of any of it. The evidence, so far as the operation of the mill is concerned, shows that A. B. Hammond was upon the property on but a very few occasions in his whole life. His presence there occasionally during the construction of the mill by the Montana Improvement Company, was before the cutting complained of had begun. It was before Fred Hammond took the mill by purchase from that com-

pany. On one of these occasions he told a fifteen-year-old boy that the boy was too young to drive a wagon—so the boy—now a man of forty-five—says. It further appears that appellant twice went over to the mill during Fenwick's ownership to see his sister, who was George W. Fenwick's wife. He once told a man that he had recommended him as a logger to Mr. Fenwick. It also appears that he sent another man to another mill, called the Wallace Mill, to apply for work. There being no work there, he was sent from the Wallace Mill to Mr. Fenwick's mill and there obtained work.

These are the only fragments of evidence that connect A. B. Hammond with this whole transaction upon the Hell Gate.

Mr. Hammond testifies:

> "When Fred A. Hammond sold to George W. Fenwick, I did not, either directly or indirectly, acquire any interest in the mill, business, or property that G. W. Fenwick thus acquired. I did not ever individually at any time own any interest . . . in the Bonita property with Henry Hammond or Fred A. Hammond or George W. Fenwick. . . . I did not at any time ever participate in any of the profits of the Bonita Mill or property while the same was being operated by George W. Fenwick or Fred A. Hammond, or at any other time.
>
> "The Missoula Mercantile Company was never at any time interested in either of these companies or in the profits derived from the conduct of the business there. The Blackfoot Milling and Manufacturing Company was never at any time interested in the business of the Bonita Mill, either while owned by Fred A. Hammond or George W. Fenwick, or at any other time. The Big Blackfoot Milling Company was never at any time interested in the property or profits of said mill under said management, or at any other time" (Tr., pp. 657-8).

Mr. Fenwick testifies:

"Q. Did Mr. A. B. Hammond have any interest, either directly or indirectly, in your purchase of the Bonita Mill?

"A. Not one cent; either directly or indirectly; nor did Mr. Eddy; nor did the Missoula Mercantile Company; nor did anybody else, either directly or indirectly. He had no interest whatever. The matter was a strictly private arrangement between Fred Hammond and myself.

"None of the profits of that business went to any other person than myself. Neither Fred Hammond nor A. B. Hammond at any time shared in my profits; nor did the Missoula Mercantile Company, nor the Montana Improvement Company have any interest in my profits. . . .

"While I was operating the mill at Bonita, I did not sell any lumber to the Missoula Mercantile Company. Mr. A. B. Hammond did not, nor did any firm or corporation with which he was connected, purchase any lumber from me at any time while I was operating the Bonita Mill" (Tr., pp. 556-7, 568).

THE THEORY OF THE COMPLAINT COMPLETELY REFUTED.

The complaint in its original form reads:

"That said defendant in committing the said acts in this paragraph last named acted as the General Manager in charge of and directing all of the business of a certain corporation . . . known as the Montana Improvement Company, Ltd., and a corporation known as the Blackfoot Milling and Manufacturing Company" (Tr., p. 3).

During the trial this allegation was amended by adding to the foregoing allegation the words "Missoula Mercantile Company" and "Big Blackfoot Milling Company" (Tr., p. 61).

The allegation in the complaint as amended is that these trespasses were committed by A. B. Hammond while he was the manager and in control of four cor-

porations: 1, The Montana Improvement Company; 2, The Blackfoot Milling & Manufacturing Company; 3, The Big Blackfoot Milling Company, and 4, The Missoula Mercantile Company.

I have already dealt with the relation of the Montana Improvement Company to this transaction, and have shown that it had nothing to do with the cutting done by this mill on the Hell Gate. That eliminates the first element in the charges against the defendant so far as the Hell Gate is concerned.

It is not here contended that the big Blackfoot Milling Company ever had anything whatever to do with the Hell Gate. That eliminates a second charge; nor is it contended that the Blackfoot Milling & Manufacturing Company ever had anything whatever to do with any trespasses on the Hell Gate. That eliminates the third element in the four charges in the complaint, and leaves only the Missoula Mercantile Company to be considered.

If the Missoula Mercantile Company was not responsible for Fenwick's trespasses, then appellant, whose only relation to the corporation is that of stockholder and director, is of course not liable. Here again I must go a little bit into the history of the company.

THE MISSOULA MERCANTILE COMPANY HAD NO PART IN FENWICK'S CUTTING.

In 1876 a firm called Eddy, Hammond & Company was organized for the purpose of conducting a general merchandise business in the then little town of Missoula, Montana. Its business was with trappers, and Indians, and traders, and farmers, and lumbermen, and others who were building up that pioneer portion of our country. Coin was scarce; banking facilities were almost unknown, and the result was that the little establishment was used as a bank by the traders, trappers, lumbermen, and farmers. If A owed money to B, he would give an order on Eddy, Hammond & Company, who would charge it to A, and credit it to B. So universal was this practice, that these transactions came to be called "Bitter Root turns" (Tr., pp. 641-3). In the course of these transactions a farmer from the Bitter Root Valley, for instance, would be given credit by Eddy, Hammond & Company and his account would be carried, and after a while he would pay off his account. And so, too, with hunters and trappers; and so with mill men, and so, too, with contractors connected with the building of the Northern Pacific Railroad. It was the general course of the business of Eddy, Hammond & Company to extend credit to customers. From 1876 to 1885 that business continued to be conducted under the name of Eddy, Hammond & Company. The partnership was a totally different con-

cern from the firm of E. L. Bonner & Company—the Northern Pacific contractors (Tr., pp. 643-649). The members were different. One Robertson was not a member of the firm of Eddy, Hammond & Company, but said Robertson, together with Eddy, Hammond, and Bonner were the members of the said contracting firm of E. L. Bonner & Company.

Such was the business of Eddy, Hammond & Company in 1885, when the Missoula Mercantile Company was organized. Eddy, Hammond & Company transferred all of its business to the new corporation, and from that day to this the Missoula Mercantile Company has proceeded with its business until to-day it is one of the greatest business corporations of the Northwest, with a capital of upwards of a million dollars.

The defendant Hammond in 1885 became and has since continued to be a stockholder in the Missoula Mercantile Company, owning about one-third of the stock. At no time during the period in controversy did appellant ever own more than one-third of its stock. It has never dealt in lumber.

> "The Missoula Mercantile Company never dealt in lumber; it never owned any sawmills, nor did it ever own any stock in any corporation interested in sawmills" (Testimony of A. B. Hammond, Tr., p. 643).

There have been at all times divers other stockholders holding various numbers of shares. The *bona fides* of the corporation is not questioned. De-

fendant A. B. Hammond has at no time owned the control of it. Mr. Fenwick while he was operating the Hell Gate mill was a customer of the Missoula Mercantile Company. That is as near as defendant A. B. Hammond comes to having any relation with Fenwick's mill.

FENWICK MERELY A CUSTOMER OF THE MISSOULA MERCANTILE COMPANY.

Fenwick had a store at Bonita in connection with his mill. He bought his goods of the Missoula Mercantile Company, and he paid for them. In company with other mills, Fenwick's mill maintained an office in Missoula which was located in or near the building or store of the Missoula Mercantile Company. This office served as a clearing house for these various mills. From there they sent out invoices; there they received their money, and transacted some of their business. The expenses of the office were paid, not by the Missoula Mercantile Company, but by the different mill men. It was something totally different and distinct from the Missoula Mercantile Company. There is nothing to justify any inference that it was a part and parcel of the Missoula Mercantile Company. The evidence is just the contrary.

Fenwick had generally a large credit balance with the Missoula Mercantile Company. When he had a debit balance he paid interest to the Missoula Mer-

cantile Company; when he had a credit, they paid him interest (Tr., p. 569). He was residing at his mill away off in the woods. There was no postoffice at his mill. He would give an order or check to a laborer on the Missoula Mercantile Company. Perhaps the man would buy goods with it, and in that way the order would be taken up. Perhaps the man would receive money. The goods or the money would be charged against Fenwick's account. This course of business—this banking—this method of doing business—was carried on for Fenwick by the Missoula Mercantile Company, just as it was for farmers, contractors, trappers, and Indian traders. Some of the latter traded as far North as the British line.

A. B. Hammond owned one-third of the stock in the Missoula Mercantile Company—no more. Is there any principle of law which would make the Missoula Mercantile Company liable for a conversion committed by these trappers, traders, farmers, or lumber mills men? And is there any principle of law which holds a stockholder in a corporation liable for conversion because the corporation in which he holds stock has sold goods to and carried the account of a man who in the course of conducting a farm or a lumber mill commits an innocent trespass upon Government land?

That is this case—and if the Government had sued the Missoula Mercantile Company instead of A. B. Hammond, it could not have recovered judgment. If the corporation is not liable, it is obvious that

neither its directors nor its stockholders would be liable as such.

If, then, A. B. Hammond is to be held responsible for the timber which Fenwick cut on the Hell Gate, it must be for a better reason than is afforded by the circumstance that Fenwick traded at the Missoula Mercantile Company's store.

MISSOULA MERCANTILE COMPANY NOT AN AGENCY OF APPELLANT.

A. B. Hammond was a director of this Missoula Mercantile Company. There is no suggestion in the evidence that the corporation at any time was merely his agency. On the contrary, he was one of its agents. He did not even own the control of the corporation. The complaint itself says that he was the manager. He was a mere agent like any other director. Like any other agent, if he had in the course of his agency trespassed upon public lands and converted timber, he would like any other agent who actively participates in a tort, have been personally liable for conversion. But he did nothing of the sort. He did not touch it. He did not direct the taking or the cutting of a single stick of it. He had nothing to do with the sale or with the use made of it after it was sold. He had no directing hand with regard to it. And how are you going to hold him guilty of a conversion, in view of the fact that he took no part in the conversion? To do so will abrogate every principle of law.

I read from *Folwell* v. *Miller,* 145 Fed., 495-6:

> "That the defendant was not liable merely because he was president of the corporation and a stockholder is a proposition which does not require extended discussion. The president of the corporation is an agent of very ex-

tensive, but not unlimited, powers. He is not personally liable because of his official capacity, any more than are the directors or stockholders, for torts committed by the corporation, **in the absence of personal participation in the tortious act.** As an agent, he is not liable for the acts of misfeasance or nonfeasance of his subordinate agents or employes. *Bath* v. *Caton,* 37 Mich., 199; *Paper Co.* v. *Dean,* 123 Mass., 267; *Brown* v. *Lent,* 20 Vt., 529; *Murray* v. *Usher,* 117 N. Y., 542, 23 N. E., 564; *Nat. Cash. Reg. Co.* v. *Leland,* 94 Fed., 502, 37 C. C. A., 372; *Arthur Griswold,* 55 N. Y., 400."

Folwell v. *Miller, supra.*

I have now given to your Honors the facts in connection with the operations on the Hell Gate.

II.

THE BLACKFOOT TRESPASSES—SYLLABUS OF THE ARGUMENT.

1. HISTORY OF THE MILL ON THE BLACKFOOT.—One Henry Hammond built and owned this mill from 1885 to 1888. He sold it in 1888 to the Blackfoot Milling & Manufacturing Company. That corporation in 1891 sold out to the Big Blackfoot Milling Company. All of the stock of the latter corporation was sold in 1895 to the Anaconda Mining Company. The only relation of appellant A. B. Hammond to the enterprise is that he owned one-fifth of the stock and until 1895 was on the Board of Directors.

2. AN ENORMOUS AREA CUT OVER BY THE BLACKFOOT MILL.—Under the personal management and direction of Henry Hammond the Blackfoot Mill logged over an area 75 miles long by three or four wide. The proofs of timber trespasses of any consequence on Government lands narrow down to three parcels—one of 40, one of 80, and one of 120 acres.

3. APPELLANT IN NO MANNER CONNECTED WITH BLACKFOOT TRESPASSES.—These three trespasses were all accidental.

(a) The first was committed while Henry Hammond owned the mill. He bought and took the timber on said 160 acres from a homesteader who had commuted his entry and who in good faith had paid the Government for the lands;

(b) The second was committed while said Henry Hammond leased said mill from the Blackfoot Milling and Manufacturing Company and was operating it on his own account. Contractors who had a logging contract with Henry Hammond, inadvertently cut over the lines and took timber from less than 80 acres of Government land.

(c) The third was committed while the Big Blackfoot Milling Company had a permit from the Government to cut timber on some 11,000 acres. Among the lands petitioned for and supposed by the corporation to be embodied in the permit was a certain 40 acres. There was no reason on earth why the permit should not have covered it. It covered all the lands surrounding it. Obviously, through a clerical error it was omitted. Although the company cut over these 40 acres, it turned back to the Government, uncut, thousands of acres embraced in the permit. This shows how utterly purposeless and innocent the trespass was.

4. NO PLAN OR INTENT TO STEAL TIMBER.—The foregoing are the only trespasses of any consequence committed on the Blackfoot. Appellant A. B. Hammond was as guiltless in law and as ignorant in fact of these trespasses as was the President of the United States himself. The charge that a company which had lawfully cut over this gigantic area, deliberately planned and schemed to steal the timber on this petty acreage is utterly silly.

5. APPELLANT NOT LIABLE FOR THE ACTS OF OTHER PERSONS.—Henry Hammond may in law be liable for what timber he innocently took, but appellant is

not responsible for Henry Hammond's acts. The lumber company may be liable for what it innocently took, but no mere stockholder is liable, nor is any director or other agent of the corporation liable, unless he has actually participated in the acts of conversion. A. B. Hammond was a director of the company, but was not on the ground, had no personal knowledge of the trespasses, was not a joint *tort feasor,* and hence, is not liable for any trespasses committed by the corporation.

Now I wish to turn your attention to the Blackfoot River. There is no more excuse for holding Mr. Hammond liable there than there was on the Hell Gate. These lands on the Blackfoot, unlike those on the Hell Gate, were not "mineral lands" and were not supposed to be. They were lands that had been surveyed. The alternate sections belonged not to the Government, but to the Northern Pacific Railroad Company.

I desire to emphasize the fact that for fully twenty years one Henry Hammond,—not my client A. B. Hammond—first for himself, and later on as the lessee of the Blackfoot Milling and Manufacturing Company, logged upon the said Blackfoot River. In the course of that time Henry Hammond cut—or the companies of which he was the manager—cut under his direction for a distance of seventy-five miles up that river. When you compare that vast territory thus cut over with the petty acreage alleged to have been trespassed upon, your Honors should be moved to view with scorn the suggestion in the complaint that A. B. Hammond took this com-

paratively petty number of trees pursuant to a plan to steal timber from the Government lands entered into while he was in control of these various corporations, and while acting as their manager. At no time did he have the management or control of any corporation cutting timber on the Blackfoot. At no time did he direct the cutting of timber thereon. At no time was any trespass committed on Government land pursuant to any plan whatsoever, or otherwise than by innocent accident.

Here are the circumstances:

Among the activities contemplated by the same Montana Improvement Company already considered by us, it had had its eye upon the Blackfoot, where the Railroad owned the alternate sections, which it had a contract to cut. It had attempted to construct a dam soon after its organization in 1883, but in the winter or spring of '84 that dam went out. The remnants of the dam were there when that company went into liquidation, and in 1885 those remnants of the dam and whatever rights it had at the damsite were sold for $300.00 to Henry Hammond. The bill of sale, the instrument of transfer, appears in the record (Tr., p. 429).

Henry Hammond was a man of independent means. He was a brother of the defendant A. B. Hammond. He was not associated with appellant in business, but had been engaged in contracting prior to 1884 in the State of Washington on his own account (Tr., p.

481). In addition, he had the backing of one Marcus Daly, who advanced him as much as $50,000 at a time to help him in his operations on the Blackfoot (Tr., p. 485). There is no question or suggestion in the evidence that Henry Hammond did not buy that Blackfoot property in good faith, that he did not as the owner thereof build the mill and operate the same from 1885 to 1888 (Tr., pp. 429-434). Of this there is not one particle of doubt.

THE BLACKFOOT MILLING AND MANUFACTURING COMPANY BOUGHT THE BLACKFOOT MILL IN 1888.

In 1888 the Blackfoot Milling & Manufacturing Company was organized. It was not organized merely to take over that mill from Henry Hammond, but it took over various properties in various places in Montana (Tr., p. 660). It appears to have had a large capital. It operated flour mills, and stores, as well as lumber mills; it also had other lumber mills in the Bitter Root Valley.

Henry Hammond received for his interest, for his property on the Blackfoot, 25% of the stock of this new corporation. A. B. Hammond, along with divers other persons—not by any means identical with the stockholders in the Missoula Mercantile Company at that time, and not identical with those in the Montana Improvement Company—A. B. Hammond, along with others, were the stockholders in the Blackfoot Milling & Manufacturing Company, and said A. B. Hammond owned about 20% of the stock (Tr., p.

661). As a part of the consideration for his transfer of the Blackfoot mill to the new corporation, it was provided that Henry Hammond should operate the mill under a lease—for which he paid rent—from the Blackfoot Milling & Manufacturing Company for some three years, with the privilege of extension (Tr., p. 434).

BIG BLACKFOOT MILLING COMPANY ACQUIRED THE MILL IN 1891.

The evidence is absolutely without contradiction that until 1891, Henry Hammond continued to operate that mill under this lease. He was his own manager under his lease. In 1891 after the expiration of his lease, he managed the property for the Big Blackfoot Milling Company, a corporation which had succeeded to the property and business of the Blackfoot Milling & Manufacturing Company. The evidence shows that he paid rent during his lease (Tr., p. 439); that he himself handled his lumber, and there can be no question upon that point.

Henry Hammond testified:

> "Mr. A. B. Hammond never at any time had, either directly or indirectly, in my name any interest in either the Big Blackfoot Milling Company or the Blackfoot Milling and Manufacturing Company. He never directly or indirectly at any time had any interest in the one-quarter, or thereabouts, which I say I owned. He never at any time either directly or indirectly had any share or interest in the profits of the business which may have been earned during the time that I was operating it individually or during the time that I was operating it as a lessee. Mr. A. B. Hammond had nothing to do with the making of

any contract for the sale of lumber or timber of the Big Blackfoot Milling Company during the years that I was president of the company. Mr. A. B. Hammond had nothing to do with the business while I was conducting it for myself upon the Blackfoot. He had nothing whatever to do with it while I was conducting it as a lessee. While I was conducting the business as president and manager at Bonner for the Big Blackfoot Milling Company, A. B. Hammond had nothing to do with the management of it any more than any other stockholder" (Tr., p. 442).

It appears that the Blackfoot Milling & Manufacturing Company having these varied interests in flour mills, stores, and lumber mills—among which was this Blackfoot mill—was desirous in 1891 of issuing preferred stock, with the result that for purposes of convenience the Big Blackfoot Milling Company was organized, and to that corporation the first company transferred all of its assets, including this lumber mill on the Blackfoot. It was but a continuation in another form of this Blackfoot Milling & Manufacturing Company. Henry Hammond's lease expired. This new corporation operated the Blackfoot mill thereafter on its own account with Henry Hammond as its manager.

ONLY THREE SMALL PARCELS ON THE BLACKFOOT WERE TRESPASSED UPON.

While I am on the subject of the Big Blackfoot Milling Company, I should say that in 1895 all of the then stockholders thereof, including the appellant, sold out their stock to the Anaconda company, and since then the Anaconda company has been in control of the said lumber company. The new stock-

holder has continued its existence. The operations have continued on the Blackfoot so that all of the parties that I have mentioned in the course of this argument, with the exception perhaps of Marcus Daly, passed out of any relation with the Blackfoot Company in 1895. But that corporation lives and is in business in Montana and it has not been sued!

Now, as to the question of trespasses on the Blackfoot: there is not a suggestion of moral turpitude in connection with any of them. I am not confronted with a case where I must try to palliate or excuse a wilful trespass. Whatever has been done has been done innocently, and whether Henry Hammond or any other person is liable, the liability arises out of an innocent trespass only.

THE EDGAR TRESPASS.

Only three trespasses of any consequence are shown in the evidence. The first was committed in 1885 by Henry Hammond. *Appellant A. B. Hammond had no part whatever in it* (Tr., p. 444). In the fall of that year a man named Edgar filed a homestead claim on 160 acres of land. Edgar was a man who had lived for upwards of twenty years in Montana (Tr., p. 416). He was a man of family. He settled with his family on that 160 acres. He had 20 cows, and grew vegetables on the land then filed upon by him; he supplied milk and vegetables to the mill crews who were working in

the immediate vicinity. His land though timbered was good agricultural land. Enough work was done by that man to have entitled him during the three or four years that he lived on the property to commute the homestead and buy the land. It is rare indeed that such a good showing is made of actual work upon his claim by a homesteader as we have upon the Edgar claim. Henry Hammond bought some logs from that man in 1885, while he was clearing his ground. At that time Henry Hammond alone owned that Blackfoot mill. In 1886 or 1887 Henry Hammond also bought and paid for other logs upon this same homestead claim (Tr., pp. 444-447). They were cut from Edgar's homestead claim and taken to the mill.

This man who was in fact a *bona fide* settler paid the full amount to commute his homestead. The Government took his money, but the amount was long thereafter returned to him. Why? After holding the money a long time, the Government returned it because Edgar had not made proper proof of his citizenship (Tr., p. 446). The evidence is that the courthouse of another State, where he had filed his declaration, had been burned and its records destroyed (Tr., p. 415). Subsequently, Edgar appears to have given up the hope of proving up on the claim, and his homestead entry was canceled. And now Henry Hammond, who purchased from him while his claim was apparently indubitable, is probably tech-

nically liable to the Government for the timber he bought from this man Edgar. But that does not mean that A. B. Hammond, who knew nothing of the transaction, who is not shown to have had the slightest connection with it, is liable to the Government for what his brother took. His brother was in business for himself, and Mr. A. B. Hammond, neither in morals nor in law, was his brother's keeper to any such extent.

THE BOYD TRESPASS.

Next as to the 80-acre trespass. This is known in the record as the "Boyd Trespass" (Tr., pp. 526-527).

The evidence is absolutely clear that the loggers in the woods for Henry Hammond and for the Big Blackfoot Milling Company were told to respect with the utmost care the Government lines, and not to cut over them (Tr., pp. 529-530). When after twenty-odd years have passed and when an area 75 miles long by three or four wide has been cut over, does not the circumstance that only three petty errors were made demonstrate to your Honors' entire satisfaction that nobody concerned in this transaction intended in these few instances to wrong the Government?

At any rate, the testimony of the Government's own witnesses is that they were warned not to go over the lines. There was some mistake; the contractor who had the contract to cut the timber on lands which belonged to that company got over the line and committed the Boyd trespass. For that error A. B. Hammond is held responsible by this verdict. He was utterly ignorant of it. His only possible connection with it

is that he was a stockholder and director of the Big Blackfoot Milling Company.

I can understand that circumstances might arise where some arch villain would organize a corporation as a cloak, that he might hide behind it, and go upon Government land and steal timber. But where is the law that a stockholder or a director of a *bona fide* corporation—a man who is only one of a board of several directors—who has no personal connection or contact with any cutting that is done, who does not touch the timber that is taken, where he has not even set his foot upon the land, and is utterly ignorant of the fact that the particular land is being cut over—where is the law that makes him—a mere director and stockholder—liable for any trespass or conversion which the corporation innocently commits? His is the liability of any other agent. If he knowingly aids the corporation in trespassing, if he directs it, if in short, he is a joint tort feasor, he is liable like any agent or employe who participates personally in a tort. But in any other case of conversion by the corporation his liability is only that of an employe or other agent. He becomes liable only where his own acts enter into the unlawful taking.

Folwell v. *Miller*, 145 Fed., 496.

THE "PERMIT" TRESPASS.

But one other alleged trespass remains to be considered. While the Big Blackfoot Milling Company was operating this property, it obtained from the United States Government, pursuant to the Act of 1891, through the Secretary of the Interior, a permit to cut upon some 11,000 acres of timber land (Tr., p. 462). Timber which the Company could cut under that permit did not cost the company a penny. The company was merely required while cutting to comply with the rules and regulations of the Interior Department. Among the lands so sought by the company was a certain forty, or perhaps it was eighty, acres of land. The company asked for both the north half *and* the southwest quarter of a section 18 (Tr., p. 453, 4th line). In the permit granted to said company there were many errors. It was even given the permission to cut over something like 1,000 acres that it had not asked for at all. And in the course of writing out the permit, this forty or eighty acres of land,—almost completely surrounded by other lands as to which the permit was granted,—was omitted, through what obviously was a clerical error. It appears that instead of granting the right to cut the north half and the southwest quarter the permit describes the land as the north half *of* the southwest quarter (Tr., p. 463, middle). The description in the permit was very long; the company thought it got what it had asked for. It cut that forty or eighty

acres. It did not cut thousands of acres included in the permit which it could have had for nothing. It was not required to pay one cent for what it cut. But now because that company cut that forty acres, the Government now sues this appellant! A. B. Hammond knew nothing of the fact that any trespass was being committed. He was never on this whole Blackfoot property but twice in the whole twenty years that is here covered—once in 1886 to look at a log drive—a matter of interest and curiosity—and the second time when he went on a fishing trip two or three years later. He had nothing personally to do with these lands. He bore no relation whatever to the cutting on any particular section of land. A corporation in which he held one-fifth of the stock, under an entirely innocent, natural and altogether excusable mistake, cut over that small piece of land, *and A. B. Hammond is held liable therefor by this outrageous verdict as if he were a trespasser and a timber thief!*

I have now fairly, though hastily, reviewed the conspicuous and determinative facts.

I hope that the decision of this Appeal is to go upon broad grounds. It is not just, that in the twilight period of his life, one of the upbuilders of the Commonwealth should find his name stained by the suggestion in this complaint and verdict that he consciously and corruptly planned and designedly proceeded to steal from his country.

I hope that this Court will feel moved to reverse this case upon the merits. I am most reluctant to turn for protection to technical rules of law. Nevertheless, while deeply conscious of the merits of the

case, there are certain rules of law, which in any event entitle my client to a reversal of this judgment, and which therefore I feel it my duty to bring forward.

III.

THE STATUTE OF 1891 IS A COMPLETE DEFENSE— SYLLABUS OF THE ARGUMENT.

1. On March 3, 1891, Congress passed an act which declares that in any civil action brought by the United States for trespass upon timber lands in Montana, it shall be a defense if the timber was cut by a citizen of the United States for use in Montana for mining, agricultural, manufacturing or domestic purposes.

2. Said Act operates as a release, waiver or condonation of the offense. The timber in question was cut by citizens and was used in Montana. The said Act of Congress is therefore a complete defense.

3. A separate Act amendatory of the foregoing Act became a law upon the same day that it did. Said amendment provided that the timber taken must have been cut under rules and regulations of the Secretary of the Interior. But the first Act, which contained no such requirement, was in force for an appreciable length of time, otherwise it could not have been amended. If in force for even a fraction of a day, it operated as a waiver, release or condonation by the Government.

4. Moreover, the amendatory Act also condoned all past offenses. It was prospective, insofar as it referred to cutting under rules and regulations prescribed by the Secretary of the Interior. This proviso had no reference to past offenses. Prior to that time there had been no rules or regulations covering lands of the class here involved. Therefore, measured by the Amendatory Act, the trespasses have been condoned by the Government.

In the first place, if A. B. Hammond had been guilty of everything that is here charged against him, the Government has acquitted him by the statute of 1891, and the Court should have instructed the jury, as requested, to bring in a verdict for the defendant. This statute was pleaded as a defense. It was passed on the 3d day of March, 1891. It provides in Section 8, that in the State of Montana, and the other States mentioned therein, in any civil action by the United States for a trespass on public timber lands . . . "it shall be a defense if the defendant shall show that " the said timber was so cut or removed from the tim- " ber lands for use in such State or Territory or by a " resident thereof for agricultural, mining, manufac- " turing or domestic purposes," and has not been transported out of the State.

We proved in this case that every foot of this timber which was cut was cut by a resident—the corporations were residents and so were Henry Hammond, F. A. Hammond and G. W. Fenwick—and that it had been used within the State of Montana for one or more of the purposes indicated. Nothing further would need to be said to acquit my client, were it not for the peculiar circumstance, that on the same day that that Act of Congress became a law, a separate bill, which amended that Act, was rushed through Congress. This amendatory bill declared that "it " shall be a defense if the defendant shall show that " the timber so taken . . . was cut or removed

". . . under rules and regulations made and pre-"scribed by the Secretary of the Interior." This language was merely prospective. The first Act had acquitted and buried the past. This I insist was the legal effect of the two Acts. This at least is true: the one Act, being an amendatory Act—amendatory of another Act passed on the same day—it follows that for some appreciable interval of time it was the law duly declared by the Government of the United States that the facts which appear in the case at bar constitute a perfect defense.

When an offense has been released, whether the release comes from me to another private individual, or by my Government to me, that release is final, and it makes no difference that at a later date the attempt is made to withdraw that release. This offense was condoned as a matter of law. It could not be revived by the amendment. Thus through this Act we have good conscience and equity meeting, and the outrageous, harsh and inequitable results that would follow upon the decision of the United States Supreme Court which in 1910 upset all previous conceptions of the Act of June 3, 1878, will happily be avoided, and the judges will not be called upon to insist that that shall be done which is right only in the letter of the law, but is contrary to the spirit of justice.

THERE WERE NO RULES REGULATING THE CUTTING—HENCE NO VIOLATION, AND CONDONATION COMPLETE.

But the result is not changed even if we are compelled to rely for our defense upon the amendatory act. *For at no time between 1885 and 1891 were any rules or regulations whatever prescribed by the Secretary as to the cutting of timber upon lands of the character here involved.* If there were none, there could be nothing wrong in not obeying rules.

There were rules and regulations as to "mineral lands." But we now know that the lands on the Hell Gate were not "mineral lands," although they were believed to be until the U. S. Supreme Court decided the *Plowman Case* in 1910. We now know that they were just ordinary timber lands, and that nobody during all of that period could lawfully cut upon them. Therefore no rules and regulations of the Secretary ever applied to them.

We also know that the lands on the Blackfoot were likewise just ordinary timber lands and that no rules ever promulgated by the Secretary prior to 1891, attempted to give any authority to cut on them.

We have, then, a case where the cutting has been done and where no rules have ever been prescribed by the Secretary which touch the case. It cannot be doubted but that this Act was intended to cover past trespasses as well as to prescribe a rule for the future. For the future, the Secretary could under the Act

grant timber permits in cases where he never had that power before. For the future, he could prescribe rules and regulations under which the timber could be cut. But so far as the past was concerned, there never had been any rules prescribed as to lands not mineral and the Act necessarily operated to condone all such trespasses absolutely.

If this is not so, then it can only be because the Act is to be held by this Court not to be retroactive. But obviously it was intended to relate to all cases. It was a statute of repose intended to put an end to these questions which were a legacy from the pioneer days of the Western territories.

JUDICIAL CONSTRUCTION OF THE ACT OF MARCH 3, 1891, FAVORS OUR CONTENTION THAT IT CONDONED ALL PAST OFFENSES.

Only once has that statute come before the Supreme Court of the United States. This was in the case of *Northern Pacific Railroad Co.* v. *Lewis,* 162 U. S., 366, 377. It appears that about one year before the Act was passed one Lewis had cut and piled on Government land ten thousand cords of ties. He sued the Northern Pacific Railroad for burning the ties up. The defense of the company was that the wood did not belong to him; that he had stolen it from the Government's lands, and that it was on Government land at the time it was burned.

Lewis attempted to show that he had a title, by invoking the Act of 1891, but he did not show that he

was a resident or that the timber was cut for an authorized purpose. The Court said:

> "Nor did the plaintiffs obtain any rights under section 8 of the laws of Congress, approved March 3, 1891, c. 561, entitled 'An act to repeal timber culture law and for other purposes.' 26 Stat., 1095. That section was amended by the act approved on the same day, March 3, 1891, c. 559, *ibid.* 1093. Neither section grants any relief to one situated like the plaintiffs. The section in either act looks to a criminal prosecution or civil action by the United States for trespass upon public timber lands to recover for the timber and lumber cut thereon, and it is provided that it should be a defence if the defendant should show that the timber was so cut or removed by a resident of the State or Territory for agricultural, mining, manufacturing or domestic purposes, and had not been transported out of the same. *If the plaintiffs had shown these facts they would have proved enough to sustain their case on this point. They showed nothing upon the subject. It is not a case of condonation.*"

Nor. Pac. Railroad v. *Lewis, supra.*

In other words, the Supreme Court of the United States has considered that the Act in its present form condones past offenses.

IV.

THE JURY ERRONEOUSLY ALLOWED INTEREST—SYLLABUS OF THE ARGUMENT.

The Court instructed the jury to allow interest. This was error, because:

1. No interest was allowable by the law of Montana at the time of the conversion.

2. No interest was allowable by the common law as matter of right.

3. No interest was allowable by the rule laid down by the Federal courts in cases of trespass upon Government timber lands.

4. The trial court refused to correct the error as to interest, not because the Government was entitled to any interest as matter of law or justice, but because counsel for appellant said, "I except to your Honor's instructions with regard to interest," instead of saying—"I except to the portion of your Honor's instruction with regard to interest, and also to the portion of it which fixes the rate at 7%." The omission of a mere verbal formula was thus punished by a fine of nearly twenty thousand dollars. In so ruling, the trial court was obviously in error.

5. The rule regarding exceptions is intended to further justice—not to entrap litigants into unconscionable forfeitures. In another District in a Government timber trespass case, the Court remitted the interest even though no assignment of error whatever was made regarding interest either in the trial court or on appeal. This was the correct view, and means that here the trial court erred in not requiring that the interest be remitted.

There are other questions: Upon the question of interest—no interest was claimed in the complaint as

it was originally filed. The complaint was amended in open court just before the case went to argument. It was amended over the objection of Mr. Hammond and his counsel (Tr., 746). The objection and exception appear in the record. The objection was overruled and the prayer was amended so as to include a prayer for interest. The Court charged the jury that if they found a verdict for the plaintiff, they should allow interest (Tr., 770), and his Honor told the jury after reading his instructions that the rate of interest was 7% (Tr., 776). These instructions were objected and excepted to.

Now, the allowance of interest depends sometimes upon local statutes, and sometimes upon the common law. If this question is to be determined by the *lex loci*—if this suit had been tried in Montana, where the suit might have been brought—no interest could have been allowed; for the law established by a decision of the Supreme Court of Montana is that interest in cases of conversion was not allowable when the alleged torts were committed. Your Honors may take that as the established law of Montana.

Randall v. *Greenhood,* 3 Mont., 506, 512;
Palmer v. *Murray,* 8 Mont., 174, 19 Pac., 553.

If on the other hand, the question is to be resolved by rules peculiar to the United States courts, then those rules are readily arrived at. It is quite conceivable that your Honors are free to hold that in the matter of

interest where the United States is a party, the United States courts are not bound by State laws, or State decisions, even in Districts where the trespass complained of actually occurred. It is the established law in timber trespass cases where the United States is a party, that the measure of damages for innocent trespass is the value of the stumpage in the tree without interest. You have passed upon timber trespass cases very often, and have laid down the rule for damages, and you have said nothing about interest. There has been some doubt in the Land Office as to whether or not that rule means that the value of the stumpage in the tree while standing is to be taken, or whether you figure the value of the stumpage after the labor necessary to sever the log from the stump has been added to the log. In either event, the place of conversion is at the stump, and the rule seems to be that it is the value of stumpage while the tree is standing. No interest is suggested or allowed in these decisions of the United States courts:

U. S. v. *St. Anthony R. R. Co.,* 192 U. S., 524;
U. S. v. *N. P. R. R.,* 67 Fed., 890;
Gentry v. *U. S.,* 101 Fed., 51;
U. S. v. *Teller,* 106 Fed., 451;
U. S. v. *Van Winkle,* 113 Fed., 903;
U. S. v. *Homestake Mining Co.,* 117 U. S., 482;
Powers v. *U. S.,* 119 Fed., 567;
Lynch v. *U. S.,* 138 Fed., 535;
H. S. Williams Co. v. *U. S.,* 221 Fed., 234.

I understand it also to be the rule of the common law, in all cases of unliquidated damages—whether they spring from contract or tort—that interest is not allowed as matter of right. Whenever allowed it is in the sound discretion of court or jury.

Halsbury's Laws of England, Vol. 10, pages 344-345.

I respectfully submit, therefore, that it is the law of Montana, where the trespass occurred, and the law also which the United States courts adopt for themselves in Government timber trespass cases and that it is also the rule of the common law, that no interest from the date of the conversion will be allowed as matter of right.

I insist that it is the true view that interest is not allowed by the United States courts at all in cases of timber conversion where the United States is the plaintiff. But at least it must be admitted that interest is never allowed in the United States courts as a matter of right in cases of conversion, but only as a matter of discretion. This was so held in

White v. *United States,* 202 Fed., 501.

In the case at bar the court gave an instruction which allowed interest as a matter of right—not as a matter of discretion. It was an instruction which cannot stand the test at all according to the law of Montana, if that is to be our guide. It was wrong,

also according to the law as declared by the United States courts in very numerous timber cases in which the United States is a party, if that is to be our guide. Mr. Hammond is therefore erroneously charged with interest, whether we measure the instruction by the Montana rule, or by the rule of the United States courts.

While the verdict in the case at bar is for a single amount—$51,040—an analysis of it will show you this: The Government reduced its claim to 16,000,000 feet of lumber. One dollar per thousand feet was shown to be the stumpage value. The jury accordingly allowed $16,000.00 for the stumpage value, and it allowed on this stumpage value, interest at 7% for 17 years, amounting to $19,040.00; and it allowed another one dollar per thousand feet for profit which it assumed the lumber yielded. The verdict therefore takes from Mr. Hammond $51,040.00 in all, which includes $16,000 for stumpage, $16,000 for the assumed profit, and $19,040 for interest.

TRIAL COURT RULING PERMITS THE GOVERNMENT TO UNJUSTLY RETAIN NEARLY $20,000 ON A HIGHLY TECHNICAL VIEW OF A LONG ESTABLISHED RULE OF PRACTICE DESIGNED TO FURTHER JUSTICE.

I believe that on his motion for a new trial appellant made an unanswerable showing on this matter of interest in the trial court. That court, however, found as a reason for adhering to the verdict allowing interest that the objection to the instruction regarding

interest (which chances to have been taken by me) was not sufficiently specific. In that I think that the lower court was clearly in error. I had supposed for some years that I comprehended the rule of practice in the Federal courts which requires that in taking exception to the charge, counsel must not do so in a general way, but must lay his finger upon each separate legal proposition which he finds objectionable. The purpose of the rule is to direct the attention of the Court to the precise matter objected to. It is a rule intended to further justice—not to trap litigants into unconscionable losses. I said to the trial court that I excepted to his Honor's instructions "with regard to interest." When the instructions were read by the Court, there was an instruction which told the jury that if they found for plaintiff, they should bring in a verdict for interest also. It did not say that the rate should be the legal rate of 7% per annum (Tr., p. 770). Six printed pages further on in the record, your Honors will find (p. 776) that after the instruction as to interest had been given, the Court at the close of the reading of all of the instructions, had its attention called by counsel for the Government to the fact that the Court had not specified the rate of interest in the following words: "I have no exceptions. " I merely suggest at this time that the rate of interest " should be stated to the jury by the Court."

His Honor then said:

"The rate of interest is the legal rate of seven per cent." (Tr., p. 776). After that, I stated my exception to his Honor's instructions on the subject of interest in these words:

> **"I also except to your Honor's instructions with regard to interest"** (Tr., p. 780).

It seems to me that that exception pointed out to his Honor what was objected to with all of the clarity that reason can demand. In behalf of my client, I objected to the allowance of any interest at all. This objection covered the allowance of interest at any and every conceivable rate per cent. But I am told now that because I omitted to say: "I except to the portion of the instruction which allows interest and also to the portion thereof that fixes the rate at 7%"—that because I did not use that formula, my client must pay to the Government of the United States—for that bald, technical and hairsplitting reason—the sum of nearly $20,000, although the Government has no legal or moral right to one penny of the sum. It may be that the interests and dignity of the Government of the United States demand that there shall be such a wrong. I cannot be convinced that it is so. I have no further defense to make of my personal part in the matter.

NOTE ON THE LAW RELATING TO THE FOREGOING PROPOSITION.

The following reference to the authorities will, we think, demonstrate how completely the trial court misconceived the rule in question.

In justification of its refusal to grant appellant a new trial because of the erroneous instruction regarding interest, the trial court relied upon *Mobile, etc., R. R. Co.* v. *Jurey,* 111 U. S., 584, 594.

We, on the contrary, regard that case as clear authority for our own position. There the court instructed the jury as follows:

> ". . . the measure of damages would be the value of the cotton in New Orleans, where it was to have been delivered, together with interest on said sum at eight per cent. per annum from the time when the cotton ought to have been delivered."

Mobile, etc., R. R. Co. v. *Jurey, supra.*

The exception under discussion in that case was merely a general exception to the whole charge, while the real objection was only to the rate per cent.

There it was sought, under that general exception—which laid its finger on no single one of the two or more distinct propositions in the foregoing charge—to claim for the first time, after the verdict was rendered, that the rate of interest should have been 5%—the Louisiana rate,—instead of 8%—the Alabama rate.

In view of the nature of the objection so urged, the Court very properly said:

> "The charge contained at least two propositions, first, that the measure of damages was the value of the cotton in New Orleans, with interest from the time when the cotton should have been delivered; second, that the rate of interest should be eight per cent. *It is not disputed that the first proposition was correct.* But the exception to the charge was general. It was, therefore, ineffectual. *It should have pointed out to the court the precise part of the charge that was objected to.*"

Mobile, etc., R. R. Co. v. *Jurey, supra.*

And as if to make it perfectly clear that an exception such as counsel for Appellant Hammond took in the case at bar is all sufficient, the United States Supreme Court in that case proceeded to say:

> "So in *Lincoln* v. *Claflin*, 7 Wall., 132, this court said: 'It is possible the court erred in its charge upon the subject of damages in directing the jury *to add interest to the value of the goods.* . . . But the error, if it be one, cannot be taken advantage of by the defendants, *for they took no exception to the charge on that ground.* The charge is inserted at length in the bill. . . . It embraces several distinct propositions, and a general exception cannot avail the party *if any one of them is correct.*' On these authorities we are of opinion that the ground of error under consideration was not well saved by the bill of exceptions."

If by the rule declared in both of the foregoing quotations we measure the facts in the case at bar, we find this:

There it was admittedly proper to allow interest, but the rate of interest was a debatable proposition, and it was sought to object to the rate of interest and hence

two distinct propositions were involved in the instruction. *Here it has never been doubted that the rate of interest designated by the Court was proper if interest was to be allowed at all: the question of the allowance of interest at the legal rate is here a single indivisible proposition.*

There the instructions complained of, while jumbled into a single sentence, contained at least two distinct propositions of law—one admittedly proper, and one which did not question the right to include interest, but merely concerned the rate. Nevertheless, the exception taken was to the whole instruction.

In the case at bar, on the other hand, the instruction regarding interest was given as a separate instruction. It stands alone. It is wholly bad, and was excepted to specifically.

What the Court said regarding the rate of interest in the case at bar happened in this way: After the Court had finished reading its instructions, and several minutes after the instruction as to interest had been given, counsel for the Government said: "I have no "exceptions, *but I merely suggest at this time that the "rate of interest should be stated to the jury by the "Court."*

"THE COURT—The rate of interest is the legal rate of seven per cent." (Tr., p. 776).

What was thus said was in law already embodied in the instruction which the Court had given. The jury had been told to allow interest and this meant at

the legal rate. The remark of the Court about the rate was hardly an instruction; it was rather an explanation of a previous instruction. It was obviously dependent wholly upon the prior instruction. Strike down the prior instruction, and the remark of the Court concerning the rate, even if treated as an instruction, is left hanging in the air and meaningless. It could not exist apart from the prior instruction and would necessarily fall with it. Any exception which reached the prior instruction would necessarily destroy the addendum. If hairsplitting nicety is to be the guide, it may be truly said that the instruction of the Court was an instruction regarding *interest,* while the final remark of the Court was at most an instruction regarding the *rate* of interest. Our exception (Tr., p. 780) was to the instruction "regarding *interest*"—not the *rate*—and hence strikes properly at the vital thing.

A general exception is proper whenever an instruction is wholly bad. Thus the Supreme Court was careful to say in the opinion from which we have quoted, *supra*:

> "It (the instruction) embraces several distinct propositions and a general exception cannot avail the party *if any one of them is correct.*"
>
> *Montgomery, etc., R. R. Co.* v. *Jurey, supra,* (quoting from *Lincoln* v. *Claflin,* 7 Wall., 132).

And conversely, if any one instruction is incorrect *in toto,* a general exception to it will be sufficient.

(See discussion of the rule in *Repauno Chemical Co.* v. *Victor Hardware Co.,* 101 Fed., 950, and the numerous cases there cited.)

In *Pritchard* v. *Sullivan,* 182 Fed., 480, the charge was a long one. The exception taken was in the following form:

> "Defendants except to all that part of the instruction concerning the right of police officers to arrest without a warrant."

The Court said:

> "We think the exception sufficient. . . . The exception was directed to that particular part of the charge and it was as definite and precise as if counsel had excerpted the exact language of the court and appended an exception to it."

The following statement of the rule is, we submit, consistent with common sense, with reason, and with justice:

> "One of the important purposes of exceptions to a charge is to call a trial judge's attention to specific phases, claimed to be erroneous, so that he may reconsider and correct them if he desires to do so before the jury retires. This general rule must, however, be applied practically with a view of facilitating rather than impeding review. Accordingly, **if in an attempt to take an exception a general reference to a topic discussed in a charge is made, and if that topic constitutes a succinct and definite portion of the charge clearly distinguishable from and not involved in other portions, it would satisfy all rational requirements."**
>
> *Winfrey* v. *M., K. & T. Ry. Co.,* 194 Fed., 813.

The foregoing is also entirely in line with the rule as announced by this Court—Judge Morrow rendering the opinion, Judges Gilbert and Ross concurring:

> "We think the general exception taken by counsel for the plaintiff to the charge of the court in this case cannot be considered if any part of the charge states the law correctly. *The exception should have pointed out to the court the precise part of the charge that was objected to.*"

United States v. *Rossi,* 133 Fed., 383.

Another illustrative case is *Southern Pacific Company* v. *Arnett,* 126 Fed. Rep., 75, 80-1, wherein it is said:

> "The entire charge of the court concerning the measure of damages and the interest upon the damages to be allowed is contained in a single paragraph, and the only complaint of it before the jury retired was a general exception 'as to the measure of damages.' No exception was taken to the allowance of interest, nor was the attention of the court in any way called to the question of law relating to it. Counsel for the defendant by their silence waived any objection to the charge upon this ground, and the error in this respect is not here for our consideration."

Southern Pacific Co. v. *Arnett, supra.*

When the foregoing language is compared with what was done by counsel in the case at bar, the error into which the trial court has fallen becomes further emphasized.

In the case at bar counsel pointed out to the Court that he excepted to the Court's instructions "with regard to interest." That was the precise part objected

to. If it is well taken, the "charge" regarding the rate of interest is of no importance. It necessarily falls. It is a mere incident.

We respectfully submit, therefore that the form of the exception was sufficient to "satisfy all rational requirements."

V.

THE INSTRUCTION AS TO THE MEASURE OF DAMAGES WAS ERRONEOUS—SYLLABUS OF THE ARGUMENT.

1. The true measure of damages in all Government timber trespass cases, where the taking was not wilful, is the value of the stumpage. The evidence here is absolutely convincing that no wilful trespass was committed by anybody.

2. The Court in its instructions added to the stumpage value the profit on the manufactured article. The exception taken pointed out that the stumpage value is the true measure and that the instructions as given "added another element." This was clearly sufficient as a specification of the matter excepted to.

3. But the trial court held on the motion for new trial that the exception was not sufficiently specific to comply with the rule of court—and the effect is that unless this court interferes, appellant must pay over another sixteen thousand dollars to which the Government is neither legally nor morally entitled.

But I have a defense to make in regard to another one of his Honor's instructions to the jury: The trial court told the jury, in substance, that if they found that the trespass was innocent, that then they should

bring in a verdict for the selling price of the lumber, less the cost of manufacture (Tr., p. 771). That cost of manufacture would include, first, the cost of severing the log from the tree, then the removal to the mill, and the manufacture of it into lumber. When you take out that cost, that leaves two elements; namely, the stumpage value in the tree and the profit; in other words, "the value of the lumber, less cost of manufacture" would leave the stumpage value and the profit. The result was that the instruction told the jury to do what obviously it did do; namely, to bring in a verdict which would give to the Government, first, the stumpage value, and to add to this the profit, notwithstanding the fact that the trespass was an innocent one.

The exception to this instruction was taken by appellant's counsel after the reading by the Court of many pages of instructions, heard by counsel for the first time when read by the Court. Counsel was called upon to carry these instructions in his head and to state immediately and in detail in the presence of the jury the objections to these voluminous instructions—among them the instruction in regard to the measure of damages. Mr. Hammond's counsel in taking his exception said: "We insist that under the circumstances of this case the measure of damages is the value of the stumpage in the tree, and I think your Honor had added another element" (Tr.,). His Honor had in fact added the element of profit. His

Honor asked counsel for no further explanation of his reasons. I believed then, and I believe now, that I fully conformed to any reasonable interpretation of the rule which requires counsel to lay his finger upon each separate proposition which he objects to. I am now told that although it may be the law that the stumpage value is the true measure of damages, nevertheless, the Government of the United States is to take an additional $16,000 from my client, because, forsooth, it is now said that I failed to make my exception sufficiently specific! I acted in accordance with what I understood to be the rule of court procedure applicable in these matters. I then believed my exception to be sufficiently specific and definite. I believe it so now. If my client shall be charged nearly $32,000.00 in interest and in profit, which the Government is not legally or morally entitled to, merely because I failed to say, "McCarthy, come into my house," when I should have said, "Come into my house, McCarthy"—I resent it. And yet I recognize and give all respect to the rule itself. I appreciate its importance. Of course, counsel cannot be permitted to make a drag-net objection to instructions; but when the finger is laid upon the matter objected to as specifically as here appears—all has been done that a trial court may properly require. When this Court considers that such exception must be taken on the spur of the moment, and in the presence of the jury, with the attendant embarrassment—a not unreasonable

fear that the jury will get the impression that the Court itself thinks one's client liable—I submit that it should not require more of counsel than was done by counsel in this case. In both its letter and spirit there has been a fair compliance with the rule.

[See the law on this question, pp. 51-57, *supra.*]

APPELLANT COMPELLED TO DISCLOSE HIS WEALTH—AN OBVIOUS ERROR.

A. B. Hammond was compelled, first of all, to tell the jury how much he received for his stock in the Big Blackfoot Milling Company. His brother Henry had testified that for his interest he (Henry Hammond) had received $250,000.00 (Tr. p. 484). This defendant was then compelled over objections to make the statement that he had received as much as his brother Henry (Tr., p. 708). That was one item of $250,000 in the fortune of Mr. A. B. Hammond. But the inquisition did not stop there: Appellant was compelled to say that the present value of his holdings in the Missoula Mercantile Company—now twenty, thirty years after the commission of the alleged trespasses, was from two hundred and fifty to three hundred thousand dollars. I protested as best I could that it was not cross-examination; that it was immaterial; that it was irrelevant; that it was incompetent, that it was an improper inquiry into the private affairs of the witness, but without avail (Tr., pp. 708-710) and before that jury there went in the evidence

that my client was worth at least $500,000 to $550,000. Is not that obviously an error? Your Honors know in what a very few instances—in what a very limited class of cases, the wealth of the defendant can be inquired into. In some few cases where strictly punitive damages are permitted—as in cases of seduction—it is proper to inquire into the defendant's financial standing.

But the poor man and the rich man are measured by the same standard when they trespass upon the timber lands of the Government. The poor man who converts timber upon the Government land illegally must have judgment entered against him for the identical sum that it would be if he were worth millions. Who, in any case of conversion, has ever before heard of entering upon an inquiry as to the riches or private fortune of an individual? Courts have often held such inquiries to be totally irrelevant and always fatally prejudicial.

> "But a new trial must be granted in this case for the error of the judge in admitting evidence of the wealth of one of the defendants. This was clearly inadmissible, and it is impossible to say what effect it may have had upon the verdict; nor is it important to enquire, as this is a bill of exceptions. The plaintiff was entitled to the damages he had sustained, and nothing more, without regard to the ability or poverty of the defendant. The admission of the evidence implied at least that the jury might graduate their verdict, in some measure, by the means possessed by the defendant to satisfy it."

Myers v. *Malcolm,* 41 Am. Dec. (6 Hill, 292), 746;

Hutchins v. *Hutchins,* 98 N. Y., 57, at p. 64.

"But there was another item of evidence which was excepted to, and which we think was improperly admitted. The defendant was allowed to prove, under objection, that Hutchins was supposed to be worth $15,000, while he testified that he himself was not a man of property. The evidence as to the wealth of P. Hutchins was clearly irrelevant and improper, and cannot be said to have been harmless. 'Illegal evidence that would have a tendency to excite the passions, arouse the prejudices, awaken the sympathies, or warp or influence the judgment of the jurors in any degree, cannot be considered harmless. *Anderson* v. *The Railroad Co.*, 54 N. Y., 334.'"

Peck v. *Cooper,* 112 Ills., 192.

The tendency of such evidence is to give to the jury the idea that they should decide any doubtful question against the defendant; and merely because he has money—not because he is guilty—he is called upon to pay it.

If the time shall come when in these United States the rights of property are to be cast to the four winds and are no longer to be treated with respect—when a rich man's money will be taken from him in the courts merely because he is rich—it will mean that our constitutional guarantees have broken down, and that our Government as planned by our ancestors has come to an end. And if that time is ever to come, may I be permitted here to express the hope that the precedent is not to be laid for it by the United States courts in a suit wherein the Government of the United States is itself a party plaintiff!

CLOSING ARGUMENT OF CHARLES S. WHEELER.

MR. WHEELER—If your Honors please: it seems to me that I could ask for no stronger corroboration of my contentions that there is no evidence to sustain this verdict than is found in the analysis of the facts which my learned friend has given you. It seems to me in all fairness that what he has said, completely bears out the assertion that I made in my opening argument that there is not one atom of evidence to connect the appellant with a single act of conversion.

Counsel has mentioned three or four matters upon which he bases his conclusion that Mr. Hammond was a party to the trespasses. One of these relates to the Bonita Mill on the Hell Gate. It appears that in 1885, while the Montana Improvement Company was setting up that mill for Fred Hammond, A. B. Hammond made one of his very few trips over to the mill site. There he saw a fifteen-year-old boy,—now a man 45 years of age—which emphasizes the length of time which has elapsed since these alleged trespasses were committed. The boy was driving a team for the Montana Improvement Company. He said to the boy: "where is your father?"—he had known the boy's father before that—and the boy said, "he is over home." And then this witness testifies that Mr. Hammond said, "you better go back and tell him to drive his own team; you are too small." And now, try as you may, it is utterly impossible to connect that

trifling circumstance with anything involved in this case. That act occurred even before Fred Hammond had operated the property at all. And of what significance was it anyhow?

Next as to the evidence that defendant participated in sending men out from the East for the lumber camps: It appears from the evidence that Mr. Hammond and others there needed men on their various works. Mr. Hammond needed men on the railroad he was building up in the Bitter Root Valley. Other people needed men. They combined—all of these people—and sent one Hathaway East to get men, and the men were brought out. There is no evidence that Mr. Hammond himself ever got any men out for either Fenwick's or the Blackfoot mill. But if he had, of what significance would it have been? It is not contended that he or anybody else ever told them to take the timber involved in this action.

Then again, there was no postoffice at these various places where men were wanted, and consequently the store at Missoula became a sort of a labor clearing-house for all the manufacturing and farming concerns up there. The evidence is that if a farmer wanted a man to milk his cows he would send to the Missoula store for him. If Mr. Fenwick needed men for his mill on the Hell Gate, he would explain his wants to the Missoula store, and so it was with other millmen, contractors and manufacturers. And thus it was that laboring men who were around in the lumber country

came there to look for jobs and were sent around in different directions from the Missoula store. There is nothing sinister in a thing of that kind—nothing from which any inference can be drawn that this appellant was a party to any trespasses, conversion or other torts that may have been committed, either by the farmers or the mill owners or any of the other employers of labor.

And as to the suggestion that A. B. Hammond sent these laborers about as a part of a plan to steal Government timber and while he exercised a dominant control over these corporations: Such a contention is so utterly unjustifiable that it is an absurdity. Mr. Hammond had a large voice in the management of the Missoula Mercantile Company. He also gave his attention to the gigantic undertakings with which he was concerned in other directions. But the management of this Blackfoot mill was never undertaken by A. B. Hammond. He had nothing whatever to do with its actual operations in the woods, as I pointed out in the opening argument. So also as to the mill at Bonita, the evidence, as we have seen, is complete that George W. Fenwick owned that mill and managed it on and for his own account.

REPLY AS TO THE MEASURE OF DAMAGES.

Now, as to the measure of damages: Why should this Court depart from the rule laid down in *U. S.* v. *St. Anthony R. R. Co.,* 192 U. S., 524? That rule is that if the trespass is innocent the measure of damage is the value of the stumpage at the tree. That measure is laid down by the United States Supreme Court. It does not include profit. It does not include interest. The Government now asks your Honors to enter into a new field and to add something else to the stumpage value.

Let us consider the question on principle for a moment. This case is not against the party who actually made the profit. For example, suppose that Fenwick himself made money on selling this lumber: concede that he ought not in justice to be allowed to keep that profit. He would suffer no loss of capital if he were deprived of the profit. It would not operate as a punishment, let us say, if this profit is taken from Fenwick. But how about the case of an agent of Fenwick's? Suppose that his foreman in the woods who actively participated in the cutting and handling of the logs and who, therefore, in law, is guilty of conversion —suppose that he, the man who actually sawed this timber down—suppose that he is the man sued? He is absolutely innocent of any intentional wrongdoing. **Are you going to hold him under counsel's new rule, and say that he is liable not only for the stumpage, but also for the profit which his employer made?**

Take a step further: A. B. Hammond was merely an agent for the corporation. The theory is that that corporation is somehow responsible for Fenwick's trespass. A. B. Hammond himself owned one-quarter of the stock in it. Concede that some one made a profit on the lumber. Who made it? That corporation did not get it (Tr., p. 557). Fenwick, as we have seen, turned over his lumber to Marcus Daly. Daly paid Fenwick, and Fenwick got the profit. If upon any conceivable theory the Missoula Mercantile Company could be liable if it were sued here with A. B. Hammond, is it not absurd to say that its liability would include the profit that Fenwick made—none of which came to it? But appellant Hammond is even further removed. He merely held one-quarter of all of the stock in the Missoula Mercantile Company. Shall he be punished by having an amount equivalent to Fenwick's whole profit charged against him and given over to the Government? Manifestly such a rule as counsel contend for would not—at least as against anyone save the man who made the profit—be either just or founded in sound reason.

A PRECEDENT FOR DISALLOWING INTEREST—EVEN IN THE ABSENCE OF A PROPER OR ANY OBJECTION—IF IT WAS UNJUSTLY AWARDED IN FAVOR OF THE GOVERNMENT.

With reference to the technical objections raised by the trial court on its own motion to the sufficiency of the exceptions to the instruction as to interest: I hope that your Honors will carefully consider the case in 202 Federal Reporter already referred to by me (*White* v. *United States,* 202 Fed., 501). There it appears that there had been no instructions at all upon the subject of interest in the court below. The Government had obtained a judgment which included interest. There had been no assignment of error whatever in the court below. There was in the assignments of error taken on the writ of error no assignment whatever upon the point of interest. And yet the United States Circuit Court of Appeals for the Fifth Circuit—which occupies the same high position that your Honors occupy—anxious to do exact justice, said that the error was so palpable that the Court would correct it, even in the absence of any exception or assignment of error whatever.

The Court there said that the allowance of interest in the United States courts is not a matter of right, but rests in the discretion of the jury. And the Court said that after a lapse of 13 years the probability was that the jury would not have allowed any interest, because of the long and unexplained delay on the part of the Government in bringing the action, and that Court,— desirous of deal-

ing out exact and proper justice between the United States and its citizens—granted a new trial unless within a given time the Government should throw off that item of thirteen years' interest. That, I submit, is the correct view for the Federal courts of justice to take wherever the error is palpable and results in gross injustice. If that is so, what should the Court do in the case at bar, where counsel protested in the court below the best he knew how against the allowance of interest, and assignments of error were duly made both there and here?

If I correctly interpret that decision in *White* v. *United States, supra,* it means that the dignity, the integrity and the honor of the Government of the United States are sufficiently high to preclude it from taking advantage of hairsplitting technicalities in order to take money out of the pockets of its citizens—money to which it—a sovereign government—has no legal and no moral right.

We have to-day filed Vol. I of our brief. We have put into that a very careful review of all of the facts. We know that your Honors will find the statement fair. Vol. II of the brief will be filed in due course. It will deal with the law of the case. My argument before you to-day will be printed, and elaborated, with your Honors' permission, by reference to certain authorities. I may also refer to some facts in answer to my learned opponent.

I appreciate very much your Honors' courtesy in permitting me to go beyond the usual time in argument to-day.